SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1359

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**HENRY I. SIEGEL CO., INC., - - - Petitioner,**

*versus*

**NATIONAL LABOR RELATIONS BOARD, - Respondent.**

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

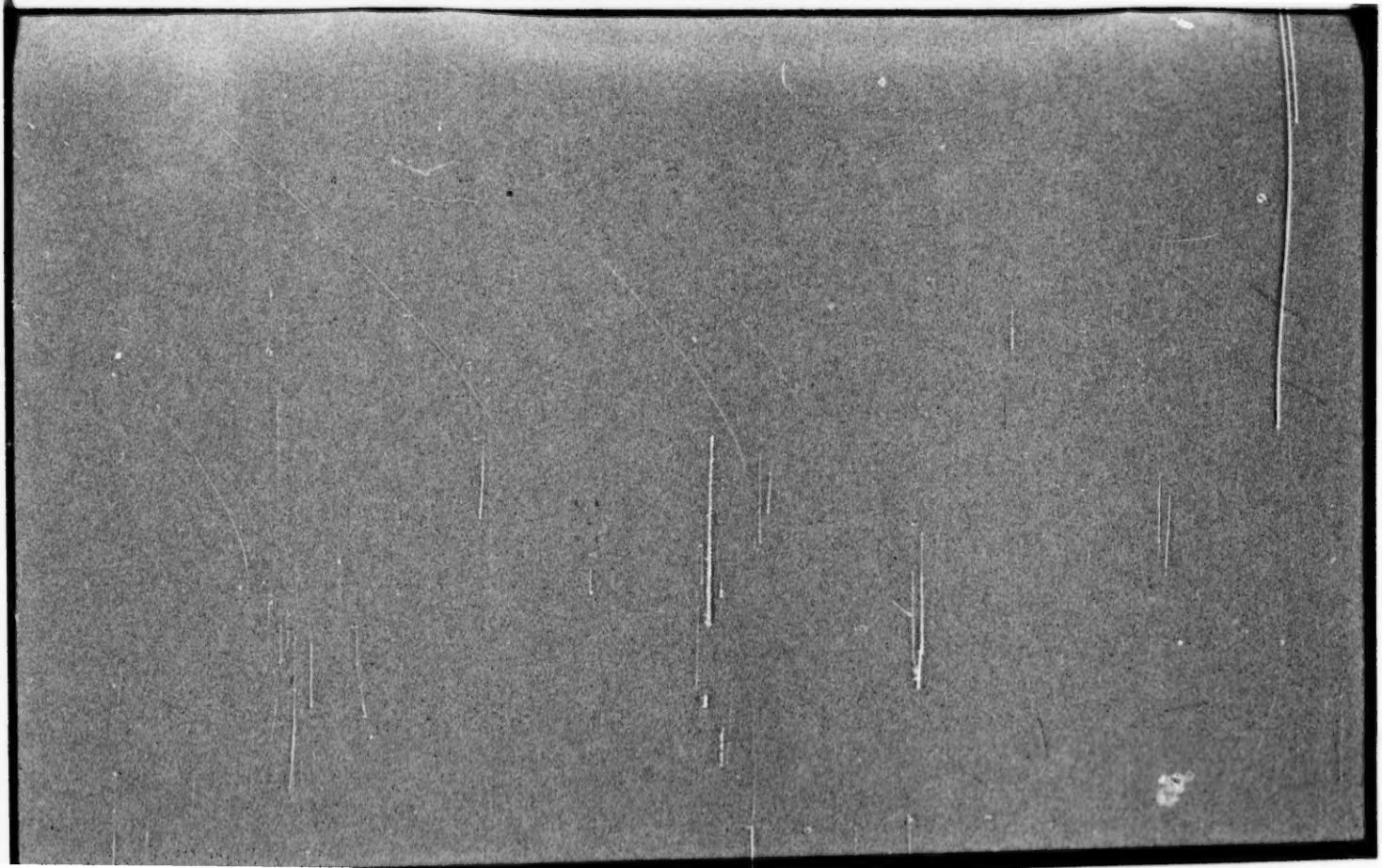
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March, 1974.

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.



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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. _____

HENRY I. SIEGEL CO., INC., - - - *Petitioner,*

*v.*

NATIONAL LABOR RELATION BOARD, - - *Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner Henry I. Siegel Co., Inc., respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 10, 1973, which said order enforced an order of the National Labor Relations Board.

## OPINION BELOW.

The order of the Court of Appeals (Appendix, *infra,* p. 15) is reported at 487 F. 2d 518.

The order of the National Labor Relations Board (Appendix, *infra,* pp. 16-17), and the decision of the Administrative Law Judge (Appendix, *infra,* pp. 18-50) are reported at 202 N.L.R.B. No. 125, but have not yet been compiled into the bound official report.

## JURISDICTION.

The order of the Court of Appeals for the Sixth Circuit was entered on December 10, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTION PRESENTED.

Approximately six weeks after a union loss of election in a unit of truck drivers and mechanics, three drivers were discharged by the Company, the stated reason being abuse of break privileges. The Administrative Law Judge, whose decision was summarily affirmed by the Board and the Court below, found in testimony of two of the three dischargees coercive interrogation, threats and creation of the impression of surveillance.[1] The discharges were found to be discriminatory, the Company's cause defense being rejected on the basis that no specific warnings of abuse of break privilege were given and the discharge action was therefore irrational, harsh and arbitrary (Appendix, *infra*, pp. 38-45).

The question presented is:

Whether under the National Labor Relations Act, there being any evidence of coercive activity by the

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[1]The denials of coercive conversations were rejected, the drivers' testimony being regarded as more reliable, logical and sincere. The Administrative Law Judge found it unnecessary to resolve the conflict between the drivers' testimony of break time of only 15-20 minutes and Company proof of 30-40 minutes for which they were discharged. [Decision, fn. no. 13, Appendix, *infra*, p. 45]. *Query.* Does such disposition reflect a proper exercise of the adjudicatory function and entitle the credibility resolutions to binding effect?

employer, proof of discharge for cause may be rejected on the basis that the discharge action was harsh and unreasonable, and the stated reason being thus dissipated as pretense, the discharge may be found to have been made for an antiunion purpose?

## STATUTORY PROVISIONS INVOLVED.

A. National Labor Relations Act, as amended [49 Stat. 499, 61 Stat. 136, 73 Stat. 519, 29 U.S.C.A. §§ 151 *et seq.* (1973)].

### Unfair Labor Practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .

### Prevention of Unfair Labor Practices

Sec. 10(c) . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

(e) . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

B. Administrative Procedure [5 U.S.C. §§ 551 *et seq.*].

Sec. 556(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

## STATEMENT OF THE CASE.

The Company employs truck drivers who deliver piece goods to, and return manufactured articles of clothing from, outlying Company plants to a central distribution center.

A Union campaign among the drivers began around the first of August.[2] The campaign was quiet, there being no proof of Company activity except as to certain conversations hereinafter stated. The drivers did not wear Union buttons and authorization cards were signed away from the plant. In late October the Union lost the election, sixteen eligible employees voting ten to six against the Union. After the election there was no further activity.

In June the Company became concerned that the drivers were taking too long on breaks at a restaurant near one of the Company's plants, by which the drivers were customarily routed. Surveillance of their activities was ordered and was conducted by the Company's

[2]All references are to the year 1971.

security manager. No established break period existed for the drivers, but they had been told that they might take breaks for reasonable periods of time not to exceed fifteen to twenty minutes.

The surveillance was intermittent in June and July, and ceased during the Union campaign. It was resumed in November. The surveillance revealed that those drivers who stopped stayed from ten minutes to one hour. Around the first of December, the Company's president, being again informed of the situation, ordered that the drivers found abusing their privilege should be immediately fired.

Acting on those instructions, a vice-president whose duties encompassed supervision of the driving operations, directed the security manager and the immediate supervisor of the drivers to go to the restaurant, and if they found drivers stopping for a break over fifteen to twenty minutes, to fire them on the spot.

On the morning of December 9, these orders were implemented. Three drivers—Hicks, Foster and Presson—were dispatched in the direction of the restaurant. Hicks and Presson arrived and stopped at the restaurant first, and Foster shortly thereafter. Although each testified that he stayed only fifteen to twenty minutes, that is, within acceptable limits, the security manager and the foreman found them to be there forty and thirty minutes. Each was discharged.

The drivers otherwise had good records, with no recorded derelictions. Each had signed a Union card. Hicks had been active in the Union campaign, soliciting authorization card signatures, attending a meeting

at his house, at that of another employee and at a neighboring city, and serving as Union observer at the election. Foster and Presson had attended a Union meeting which had not been held for the Company's employees. Additionally, Foster had attended the meeting in the neighboring city.

Presson had no conversations concerning the Union with Company officials. Hicks and Foster did. Prior to the filing of the election petition, Hicks was allegedly told in one that if he stuck his neck out he might get it chopped off and that if he was dissatisfied with his work he should quit; Foster was allegedly told by a Company vice-president and by his supervisor on separate occasions that some employees could lose their jobs if the Union were voted in.

Other than the testimony of Foster and Hicks, there was no proof of Company interference in the activities of any of the other employees in the unit.

The Administrative Law Judge found that the proof sustained all allegations of the complaint, rejected the Company's reason for discharge on a harsh-and-unreasonable therefore-pretext rationale, and found the Company guilty of discriminatory discharges, coercive interrogation, creating the impression of surveillance, and threats of reprisal. The Company seasonably filed its exceptions to his decision, which was summarily affirmed by the Board. Proceeding under Section 10(f) of the National Labor Relations Act [29 U.S.C. § 160(f)], which section vests jurisdiction in a Court of Appeals to review final orders

of the Board, the Company petitioned for review of the Board order. The Court of Appeals for the Sixth Circuit entered a memorandum order enforcing the order of the Board.

The Company, believing that the Administrative Law Judge substantially misconstrued and misapplied applicable principles of law, and that that error was compounded by the Board and Court below, has respectfully filed this petition for writ of certiorari.

## REASONS FOR GRANTING THE WRIT.

The Company is not blind to the *Universal Camera* limitations imposed on this Court—that the function of review of Board orders is lodged in the Courts of Appeal and that this Court will intervene only where the standard has been misapprehended or grossly misapplied.[3]

Why, then, should its discretionary review be afforded in this case? Are not charges of discriminatory discharge under Section 8(a)(3) of the Act commonplace and litigation of the issues involved routinely handled?[4]

It is precisely the fact that the volume of cases is great that suggests the need for this Court to state or

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[3]Universal Camera Corp. v. NLRB, 340 U. S. 474 (1951). See also, Golden State Bottling Co. v. NLRB, __ U. S. __, 38 L. Ed. 2d 388, 396 (1973); NLRB v. Walton Mfg. Co., 369 U. S. 404, 408 (1962).

[4]Sixty-three percent of the charges filed in fiscal year 1972 involved allegations of 8(a)(3) violations. 37 NLRB Ann. Rep. 225, Table 2 (1973). Offers of reinstatement were made pursuant to Board or Court order in 313 cases, and back pay of $3,589,380 was recovered. *Id.* at 228-29, Table 4.

restate clear and definitive guidelines—specific mandates to guide the labor bench and bar in the just determination of those disputes. If principles are hazy and ill-defined, or if application of supposedly established principles is random and uncertain, as this case reflects, the propensity for litigation is increased.

General principles have been enunciated by this Court. *Universal Camera*[5] teaches that under the Administrative Procedure Act and the Taft-Hartley Act the Board's order must rest on substantial evidence on the record considered as a whole, taking into account whatever fairly detracts from its weight, and that the reviewing court must assume more responsibility for the reasonableness and fairness of Board decisions and must be influenced by the feeling that it is not to abdicate the conventional judicial function. Further, it has been stated that the finding of a violation of Section 8(a)(3) normally turns on whether the discriminatory conduct was motivated by an antiunion purpose, but once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.[6] When specific evidence of a subjective intent to discriminate or to encourage or discourage union membership is shown and

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[5]340 U. S. at 487-88, 490. "The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power." NLRB v. Thompson Products, Inc., 97 F. 2d 13, 15 (6th Cir. 1938).

[6]NLRB v. Great Dane Trailers, Inc., 388 U. S. 26, 33-34 (1967).

found, such proof itself is normally sufficient to destroy the employer's claim of a legitimate business purpose and provides strong support to a finding that there is interference with union rights or that union membership will be discouraged; conduct which on its face appears to serve legitimate business ends is "wholly impeached" by the showing of an intent to encroach upon protected rights; the employer's "claim of legitimacy is totally dispelled."[7]

How are these principles to be viewed and applied? The Administrative Procedure Act, placing the burden of proof on the proponent of a rule or order,[8] speaks in terms of the ultimate risk of nonpersuasion, and is inconsistent with the principle that the burden is on the employer *to establish* motivation by legitimate objectives, unless that principle means going forward with proof to avoid an adverse finding. If proof of discharge for a reason other than that statutorily prohibited is submitted, the ultimate risk of nonpersuasion should remain on the General Counsel and not be subtly placed on the employer. The Board's determination of violation, carrying with it exposure to substantial monetary liability, should be based on persuasive proof from the entire record and an inference of unlawful purpose should not be made or drawn in the absence of such proof.

Section 10(c) of the National Labor Relations Act forbids the reinstatement of a discharged employee, if such individual was discharged for cause. Is a dis-

[7]NLRB v. Erie Resistor Corp., 373 U. S. 221, 227-28 (1963).
[8]80 Stat. 386 (1966), 5 U.S.C.A. § 556(d) (1967).

charge for cause defense "wholly impeached" and "totally dispelled" by accepted proof of independent 8(a)(1) violations, and by rejection of the advanced reason for discharge as being harsh and unreasonable? "Cause" under the Act has not been taken to mean "good" or "just" cause. Given the statutory edict, the issue of unlawful discharge must be separately viewed and decided. While evidence of related violations may be considered in its determination, that evidence, even if fully accepted, should not completely rebut a cause defense. Further, any stated impression or reasoning that the discipline imposed was not commensurate with the offense, and that it was accordingly unreasonable, goes beyond the statutory limit imposed and is wholly improper. Management may be harsh, its personnel policies even seemingly arbitrary, but the Board should not judge from that frame of reference.

The terse orders entered by the Board and the Court below afford no insight as to their rationale; the review ostensibly afforded under the Act—the obligation to make an independent review of the whole record—is not apparent. Their effect is to place a stamp of approval on the decision of the Administrative Law Judge.

Although the proof showed that the Company's policy with respect to breaks and the length thereof had been explained to the drivers, the Administrative Law Judge stressed the absence of a specific warning of the consequences of failure to abide by that policy. The Board has recognized that abuse of break privi-

leges is a proper subject of management concern, even to the extent of discharge.[9] The Eighth Circuit has held that where cause exists, there is nothing that requires an employer to warn an employee of the danger of discharge.[10] One question presented is whether a warning is a prerequisite to a lawful discharge. Certainly the Board has no power to impose a system of progressive discipline, under penalty of an adverse finding for failure to comply.

The function of the Board is to determine not whether an employee was fired for good or just cause, but whether he was terminated for an unlawful reason.[11] The Courts of Appeal have accordingly held that the employer has the right to discharge an employee for good reason, bad reason or no reason, absent discrimination, that the Act does not interfere with the normal exercise of the rights of the employer to select its employees or to discharge them, or give the Board any control whatsoever over an employer's policies, and that once it is determined that disciplinary action is warranted the extent of the action taken is purely within the discretion of the employer for whom the Board may not substitute its judgment.[12]

The rejection of the Company's asserted reason for the discharges clearly rested on the judgment of

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[9]Firestone Tire & Rubber Co., 165 N.L.R.B. 435, 444 (1967).

[10]Osceola County Co-Operative Creamery Ass'n v. NLRB, 251 F. 2d 62, 65 (8th Cir. 1958).

[11]NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1, 45-46 (1937).

[12]See, *e.g.*, NLRB v. Arkansas Grain Corp., 392 F. 2d 161, 167 (8th Cir. 1968); NLRB v. Ace Comb Co., 342 F. 2d 841, 847 (8th Cir. 1965); NLRB v. Howell Automatic Machine Co., 454 F. 2d 1077, 1081 (6th Cir. 1972).

the Administrative Law Judge that the Company's action was harsh and arbitrary, "bizarre from any industrial relations point of view" and not that taken by an employer "acting rationally" or by "an enlightened employer."[13] The only decision cited by the Administrative Law Judge was that of *McGahey*.[14] The decision there, however, rejected an evaluation of the discharge in terms of its reasonableness, it being beyond the power of the Board to second-guess or give gentle guidance by over-the-shoulder supervision to management. The principle of the decision has been accepted in other circuits.[15] Certainly, such rejection is proper if the Board in fact has no right to substitute its judgment for that of management in disciplinary areas.

The Administrative Law Judge found what he considered to be a strong prima facie case presented by the General Counsel. The proof of discharge for cause by abuse of break privileges was swept away by the harsh-pretext rationale, which in turn he viewed as evidence of improper motivation.

If the principle of *McGahey* and like cases is sound, the decision rests on an erroneous legal foundation, and should have been set aside.[16] If the principles are not sound, this Court should so state.

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[13]Decision, Appendix, infra, pp. 39, 43, 44.

[14]NLRB v. McGahey, 233 F. 2d 406, 412-13 (5th Cir. 1956); Decision, Appendix, *infra*, p. 45.

[15]See, *e.g.*, NLRB v. Ogle Protection Service, Inc., 375 F. 2d 497, 505 (6th Cir. 1967); Portable Electric Tools, Inc. v. NLRB, 309 F. 2d 423, 426 (7th Cir. 1962); NLRB v. Ace Comb Co., 342 F. 2d 841, 846-47 (8th Cir. 1965).

[16]NLRB v. Brown, 380 U. S. 278, 292 (1965).

In a somewhat analogous situation, this Court has undertaken to specify the order of proof required to establish a violation of the Civil Rights Act of 1964; there it has indicated that an employer's rebuttal proof to a prima facie case should not be underestimated, and that in the absence of proof of pretextual or discriminatory application of the reason for the managerial action a finding of violation cannot stand.[17] It is true that here other drivers had previously engaged in like activity and had not been discharged, but on the day of the implementation of the decision to discharge those abusing the privilege, only Hicks, Foster and Presson were discovered. It is further true that the Company, although it has been involved in numerous election campaigns and other litigation with the Board and has been found to have violated other provisions of the Act, has never been found guilty of discriminatory discharge. A decision of pretextual or discriminatory application, under the circumstances, is founded on quivering sands.

The Company submits that in this case, the Court should exercise its discretion and grant the writ. The case is important in that proper legal standards were not applied and the standard of review was therefore misapprehended or grossly misapplied. Further, the Court should clearly enunciate whether lack of warning, coupled with a harsh-pretext rationale, is a sufficient basis for a Board finding of discriminatory discharge.

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[17]McDonnell Douglas Corp. v. Green, 411 U. S. 792 (1973).

## CONCLUSION.

For these reasons, the Company prays that the petition be granted and that a writ of certiorari issue to review the order of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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*Counsel for Petitioner.*

March, 1974.

# APPENDIX

# UNITED STATES COURT OF APPEALS

**FOR THE SIXTH CIRCUIT**

**No. 73-1342**

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Henry I. Siegel Co., Inc., - - - - - - Petitioner

v.

National Labor Relations Board, - - Respondent

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**ORDER**—Filed Dec. 10, 1973

Before Weick, Celebrezze and McCree, Circuit Judges.

Upon consideration of the briefs and arguments of counsel, we are of the opinion that there is substantial evidence in the record to support the order of the Board reported at 202 NLRB No. 125.

It is therefore Ordered that the Order of the Board be and it is hereby enforced.

Entered by Order of the Court.

(s) James A. Higgins
Clerk

UNITED STATES OF AMERICA

BEFORE THE

# NATIONAL LABOR RELATIONS BOARD

| | |
|---|---|
| Henry I. Siegel Co., Inc.<br>and<br>Highway and Local Motor Freight Employees Local Union No. 667, Affiliated With the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America | Case 26-CA-4200 |

## DECISION AND ORDER

On September 11, 1972, Administrative Law Judge George J. Bott issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Admin-

istrative Law Judge and hereby orders that Henry I. Siegel Co., Inc., Bruceton, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the said Order.

Dated, Washington, D.C., Apr. 4, 1973.

John H. Fanning, Member

Ralph E. Kennedy, Member

John A. Penello, Member
National Labor Relations Board

(Seal)

UNITED STATES OF AMERICA

BEFORE THE

# NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES
WASHINGTON, D. C.

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| | |
|---|---|
| Henry I. Siegel Co., Inc.<br>and<br>Highway and Local Motor Freight Employees Local Union No. 667, Affiliated With the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America | Case No. 26-CA-4200 |

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John L. Johnson, Esq., for the General Counsel.

Joseph Martin, Esq., and Joseph Martin, Jr., Esq., (Martin & Cochran), Nashville, Tenn., for the Respondent.

Mr. Howard Thornton, Business Representative, Memphis, Tenn., for the Charging Party.

## DECISION

### Statement of the Case

George J. Bott, Administrative Law Judge: Upon a charge and amended charge filed by the Union on January 4 and February 22, 1972, the General Counsel of the National Labor Relations Board issued a complaint against Respondent on February 25, 1972, alleging that it had engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act. Respondent filed an an-

swer and a hearing was held before me in Huntingdon, Tennessee, on May 31 and June 1, 1972. Subsequent to the hearing, Respondent and General Counsel filed briefs which have been carefully considered.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

## Findings of Fact

### I. Respondent's Business

Respondent is a corporation with a plant and place of business located in Bruceton, Tennessee, where it is engaged in the manufacture of clothing. During the 12-month period preceding the issuance of the complaint, Respondent received goods valued in excess of $50,000 directly from points outside the State of Tennessee, and during the same period, Respondent shipped goods valued in excess of $50,000 directly to points outside the State of Tennessee.

Respondent admits, and I find that it is an employer engaged in commerce within the meaning of the Act.

### II. The Labor Organization Involved

The Union is a labor organization within the meaning of the Act.

### III. The Alleged Unfair Labor Practices

#### A. The Setting and the Issues

In addition to its manufacturing plant in Bruceton, Tennessee, Respondent also operates there a large distribution center from which it ships to its customers the clothing produced at all of its manufacturing plants. Customer shipments are usuallly made by common carrier, but Respondent also conducts an interplant trucking operation with its own equipment and drivers to transport piece goods from plant to plant for finishing and the finished garment back to the distribution center in Bruceton.

Respondent's garage facilities are located in the Bruceton distribution center. When the events in this case began in the summer of 1971, Respondent employed approximately 12 drivers and 3 or 4 mechanims. In July or August, a driver obtained union authorization cards and an effort was made to organize the drivers and mechanics. The Union filed a petition for an election with the Board on August 19, 1971, and, after a hearing, the Board's Regional Director, on September 21, directed an election among Respondent's over-the-road drivers, mechanics and mechanics' helpers. An election, which the Union lost by a vote of 10 to 6, was held on October 21, and the certificate of results issued on November 1, 1971.

The complaint alleges that Respondent, during the Union's attempt to organize the employees in the unit, created an impression among its employees that it was keeping their union activities under surveillance; coercively interrogated employees; and threatened others with loss of employment in violations of Section 8(a)(1) of the Act. Respondent denies these allegations. The complaint also alleges that Respondent, on December 9, 1971, discharged three of its drivers because they had participated in the Union's earlier campaign, but Respondent contends that the drivers were fired because they had stopped more than 20 minutes for coffee during one of their trips to one of Respondent's plants.

B. Independent Violations of Section 8(a)(1) of the Act

Truckdriver James Foster attended a union meeting with a group of other drivers in Jackson, Tennessee, near the end of August 1971. In early September, Ross, his immediate supervisor, sent him to see Sam Siegel, Respondent's vice-president in charge of the Bruceton distribution center. Foster testified that when he arrived in Siegel's

office, Siegel informed him that he understood that a carload of employees had gone to Jackson about the Union. When Foster admitted that they had, he said Siegel stated that he assumed that Foster knew that it "could mean your job if you people vote the union in."

Foster also testified that sometime in September 1971, Supervisor Ross asked him to consider voting against the Union in the coming election. Ross prefaced his request with the information that the Union "was going to put some people out of jobs" and by reminding Foster that he was a friend whom he did not wish to see "hurt." According to Foster, Ross told him that his information about possible loss of employment came from "higher officials."

Sam Siegel said he did not remember talking with Foster about the Union, but he admitted that he could have, but only if Foster "got the subject up" first. He denied, however, that he made any statement about a carload of drivers going to Jackson, Tennessee, about the Union, or telling Foster that employees could lose their jobs over the Union. Siegel explained that he knew better than to make such statements because he had been involved in every Board election among Respondent's employees and was in the habit of following counsel's advice.[1]

I credit Foster rather than Siegel because he appeared to have a better recall of events and because he impressed me with his sincerity. His testimony was given calmly and without any apparent exaggeration. Although Foster has an interest in the proceeding because he is one the alleged discriminatees, his wife and daughter are employed by Respondent. I sensed no indication of bias in his entire testimony in this area and in others relating to

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[1]The Board found that Respondent violated the Act in the following cases: Henry I. Siegel Co., Inc., 143 NLRB 386, enfd. 328 F. 2d 25 (C.A. 2); 147 NLRB 594, enfd. 340 F. 2d 309 (C.A. 2); 165 NLRB 493, enfd. 417 F. 2d 559 (C.A.D.C.); and 172 NLRB No. 88, mod. 417 F. 2d 1206 (C.A. 6).

his later discharge. I find, therefore, that Respondent violated Section 8(a)(1) of the Act by Siegel's threat that unionization of Respondent's drivers would result in loss of employment and by his remarks indicating that Respondent had its employees' union activities under surveillance.

Because I also find that Foster's testimony is more reliable than Supervisor Ross' I find that Respondent violated Section 8(a)(1) of the Act by Ross' remark that the Union was going to cause some employees to lose their jobs. Taken in context with his statement that Foster was a friend whom he did not wish to see harmed and his indication that his information came from "higher officials," his remarks were clearly coercive.

Near the end of July 1971, a group of Respondent's drivers met with Thornton, Respondent's vice-president in charge of operations, to complain about their wages. Hicks, another alleged discriminatee, said that he and other drivers signed union authorization cards after the Thornton meeting because they were dissatisfied with the way in which he had answered their grievances.

According to Hicks, in the middle of August, Sam Siegel invited him into his office and asked him what was going on among the drivers. When Hicks parried this inquiry, Siegel added that he had heard that the drivers had signed union cards. Hicks said he told Siegel that the drivers had indeed signed cards. Siegel asked him why they had and what they expected to gain from it. Hicks said he explained to Siegel that the drivers had gone to the Union for help because they felt that Thornton had given them no satisfaction. Siegel commented that he did not think the drivers could have an election of their own because the last Board election had been held on a plant basis.

After Hicks left Siegel he drove to the Gleason plant, approximately 35 miles from Bruceton. While there he

was called by Ross who told him Siegel wanted to see him again. He returned to Bruceton and went to Siegel's office where he found Sam and Jesse Siegel, the latter being Respondent's president, headquartered in the Respondent's New York City executive offices, but who also visits Bruceton frequently.

Hicks testified that when he entered the office, Sam Siegel asked him to repeat for Jesse Siegel's benefit what he had told him earlier. After he told Jesse Siegel that he and other drivers had signed union authorization cards, he said that Jesse Siegel asked him why the men did not quit if they were dissatisfied. According to Hicks, Sam Siegel stated that employees could lose their jobs because of the union activity and asked him where he would get another job if he lost his present one. Sam Siegel also commented, Hicks said, "If you stick your neck out you are liable to get it chopped off."

At the end of the interview, Hicks was asked if he would get in touch with the other drivers to determine whether they would meet with Siegel the next day. He told them he would, but although a meeting with the drivers, attended by both Siegels, was held the following day, it was apparently arranged by Thornton.

Sam and Jesse Siegel's version of why they met with Hicks and what was said are different from his. Sam Siegel said he knew that Thornton had met with the drivers but had not replied to their complaints. Because of this and since Jesse happened to be visiting Bruceton, he suggested to him that they talk with one of the drivers to find out for themselves what was bothering them. Hicks was chosen, according to Sam Siegel, because he was the most senior driver, or perhaps, he added, because he was available and would accept an invitation to talk with them.

Sam Siegel testified that when Hicks appeared they mentioned the Thornton meeting and asked him what his

problem was and how they could solve it. Hicks responded that the men wanted more money, but he hastened to add that he was not the "ringleader," which was evidently a reference to the union activity, according to Siegel. Siegel also said that because Hicks appeared a little "shaky and scared," he and Jesse tried to calm him. He agreed that Jesse may have said "something to the effect" about quitting if dissatisfied, but this he tied to the company's inability to grant wage increases at that time and not to any union activity that Hicks might be engaging in.

Sam Siegel denied that he told Hicks during their conferences that employees could lose their jobs because of the Union or advised him that he could get his neck chopped off if he stuck it out. He also said that before they met with Hicks, he had not told Jesse Siegel about employee attempts to organize but only about the Thornton meeting. He admitted, however, that it was possible that he had spoken with Hicks during the morning.

Jesse Siegel testified that he met with Hicks because Sam Siegel had told him about the meeting the drivers had with Thornton. He suggested that he would like to talk with a driver to find out what exactly was bothering them. When Sam agreed, he chose Hicks to talk with because Hicks had driven him from the Nashville airport to Bruceton on occasion.

When Hicks came in, Siegel said he mentioned the Thornton meeting and driver dissatisfaction to him and asked him what the discontent was all about. Hicks listed a number of grievances, including wages and lack of appreciation. Siegel said he was surprised because not having heard Hicks voice a complaint before this, he assumed he had none, and he told him so. He denied that he suggested that Hicks quit his employment, and he said that he only explained to him that if he (Siegel) had worked hard, but could not achieve a certain goal, and was, more-

over, emotionally upset because of his failure, he would consider leaving the environment that was contributing to his emotional distress. He stressed, however, that such a course was what he personally would do, not what he wished Hicks to do.

Jesse Siegel denied that he and Hicks discussed the union movement which was afoot. He also said Hicks did not tell him that the drivers had signed union cards, "nor was (he) interested in it," he added. He corroborated Sam Siegel's denial of Hicks testimony about threats based on his union activities.

Jesse Siegel immediately reached Thornton after the Hicks' conference, he said, and had him arrange a meeting with the drivers for the morning of August 19, which was before he had received a copy of the Union's petition for an election. The meeting was attended by a number of company officials. Thornton spoke to the employees about comparable rates in the area. Jesse Siegel said that he also addressed the employees and explained that because of costs and an earnings decline, plus the recent wage freeze, there was nothing the company could promise the employees by way of wage increases besides a wage increase in September that had been promised them the year before.

Based upon a number of factors, I conclude that Hicks' version of how he came to be interviewed by Respondent's principal officers and what was said by the participants during the interview is more logical and believable on its face than their's and that he was otherwise the most credible. First of all, since Thornton, Respondent's vice-president in charge of operations, had heard the drivers' complaints about their wages, there would appear to be no real reason why the Siegels could not have found out what the "problem" was from him and not from an individual driver. If they were displeased, as they said they were about Thornton's delay in acting on the "problem," they

could have directed him to take action immediately without further discussion of it with a rank-and-file employee. It also appears that, regardless of what was said about union activities in their conversation, Sam Siegel, I find, had clearly had Hicks in his office to talk with him about something that very morning and had him summoned back from an assignment that afternoon to meet with him again, this time with Jesse Siegel present. Thus, it seems to me, was an unusual amount of attention for a company president and vice-president to pay to an ordinary truckdriver whose only deviation from conventional employee behavior, assertedly known to Respondent at the time, was his attendance at a gripe session with another vice-president.[2] The logic of the situation is that Hicks had some important information to transmit to Jesse Siegel about the current union activity and that Jesse had previously learned of this from Sam Siegel. A further indication of this is found in Jesse Siegel's lame explanation that he chose Hicks to talk with about the "problem" because he knew him from the Nashville trips, for not only does it appear that other company drivers had performed the same services for Siegel in the past, but the explanation differs from Sam Siegel's testimony that Hicks was chosen because he was the oldest driver, or because he was available and would probably accept the invitation.

Sam Siegel had testified before Jesse Siegel was called by Respondent that it was possible that Jesse had suggested to Hicks that he quit his job if he were dissatisfied with conditions. I find Jesse Siegel's explanation for how this remark came to be uttered to be completely unconvincing and an after the fact attempt to blunt the obvious coercive nature of the statement but attributing Hicks' uneasiness during the interview to some thing other than the meeting itself with the highest official in the company and by camou-

[2]Jesse Siegel has 5000 employees under his command.

flaging the inhibiting suggestion with qualifying phrases purporting to relate his gratuitous advice to Respondent's humanitarian and overriding interest in Hicks' mental health and not to Respondent's own self interest.

I also find Jesse Siegel's statement that there was no discussion about employee union activity with Hicks and that he was not interested in it too hard to believe. Respondent's interplant transportation system upon which its manufacturing processes depend cannot operate without drivers. That Respondent would be unconcerned about their drivers joining the Teamsters Union is as incredible as Jesse Siegel's testimony that he knew nothing about the Union's organization efforts at the time he met with Hicks. Sam Siegel knew about them; he admitted that he had heard about it before he received the official notification from the Board that a petition had been filed. If he had been alerted, it is more than likely that he had alerted Jesse Siegel, particularly when they were trying to get to the root of some "problem" that the drivers appeared to have with respect to employment.

I find, therefore, that on or about August 17, 1971, Sam Siegel coercively interrogated employee Hicks about why he and other truckdrivers had signed union authorization cards. By such conduct Respondent violated Section 8(a)(1) of the Act.

At the same time, Sam Siegel told employee Hicks that if he stuck his neck out for the union, he could get it chopped off, and he also asked him where he would find another job if he lost the one he had. During the same conversation, Siegel told Hicks that employees could lose their jobs because of the Union. By such threats, Respondent violated Section 8(a)(1) of the Act.

Respondent also violated Section 8(a)(1) of the Act by Jesse Siegel's suggestion made in their conversation about union activity on or about August 17, 1971, that Hicks and other drivers quit their employment if they were unhappy.

## C. The Discharge of Foster, Hicks and Presson

### 1. The Facts

There is a restaurant called the "Crestview Drive Inn" at Gleason, Tennessee, on State Route 22, which is frequented by Respondent's truckdrivers for coffee breaks and lunch on their way to and from Respondent's Gleason plant and its other plants northwest of Gleason. Foster, Hicks and Presson were discharged by Ross, their immediate supervisor, on December 9, 1971, at approximately 9:05 a.m., as they left the Crestview after having spent 15 or 20 minutes, or 30 to 40 minutes in the restaurant, depending on whose version is accepted. There can be no question that most of Respondent's drivers had been stopping at the Crestview for a very long time, and there also is no doubt that Respondent was aware of it for at least two years, according to Thornton, who is responsible for them. It also is undisputed that Respondent had its drivers propensities under surveillance for many months and was aware that many of them were stopping at the Crestview for periods of time which Respondent now claims were unreasonable, but no disciplinary action was taken by Respondent to remedy the situation until December 9 and no employee was warned that he was abusing a privilege and that continued violations of Respondent's policy, whatever that may actually have been, would lead to his discharge.

As indicated earlier, the Union lost the Board election held on October 21, 1971, by a vote of 10 to 6. No objections were filed to the election, and the Regional Director of the Board certified the results on November 1. There appears to have been no union activity among the drivers after the election, and according to Hicks, the matter "died."

The three discharges all signed union authorization cards on August 12. Foster attended two union meetings prior to the election, one of which, that held at Jackson, Tennessee, was the one that Sam Siegel asked him about in

September 1971. Hicks solicited other employees for the Union and attended three meetings, one of which was held at his home. He also acted as the Union's observer at the Board election. Presson attended one union meeting in addition to signing a card, and he appears to have been the least active of the three.

All of the discharges had excellent work records; they had never been disciplined or seriously warned about their work. Foster had been employed for 6 years; Presson for 5; and Hicks for 10, seven of which were as a driver. As indicated earlier, Hicks was Respondent's most senior driver.

Foster, whose testimony I consider to be reliable, arrived at the Crestview restaurant in Gleason on the morning of December 9, 1971, between 8:30 and 8:45. Foster got there about five or ten minutes after drivers Hicks and Presson did, but all three left the establishment at the same time.

Foster testified that as he left the restaurant, Supervisor Ross stopped him and told him he was fired. When he asked Ross to repeat what he had said, Ross did so, adding that he was acting under orders to fire him if he caught him stopping at the restaurant.

Ross fired the other two drivers and ordered them all to turn over their ignition keys and leave the vehicles where they were parked. Security Manager Hollingsworth, who had accompanied Ross that morning, drove Ross and the dischargees back to Bruceton.

On the way back to Bruceton there were some exchanges about the reasons for the terminations. Foster asked Ross if drivers were not permitted to take breaks, and he said Ross did not give him "too good an answer." One of the drivers asked if they were the only ones who were going to be fired when it was also the practice for other drivers to stop at the Crestview. Ross admitted, according to Foster's credited testimony, that he knew that the three discharges and other drivers had been stopping at Crest-

view and that the three who he had just apprehended had not been spending any more time there than some of the others. Ross also indicated, however, that because Foster, Hicks and Presson were the only drivers he had caught, they were the only employees he had orders to fire.

When the employees arrived at Bruceton they were permitted to talk with Sam Siegel.[3] Hicks, who did most of the talking, asked why they had been fired and if breaks were not allowed. According to Foster, Siegel said breaks were not permitted because the drivers were paid for a full day, but he also made some reference to the length of time the drivers had been spending at the restaurant. In any case, it is clear that the men protested that they had been acting no differently in this instance than they had in the past and that Siegel replied that it had been going on for only "two of three months."

Foster testified without contradiction that it had been his practice for many years to stop at the Crestview in the morning on almost every trip which took him past it and that every other driver going in that direction did too. He said that his stays usually lasted 15 or 20 minutes and that the pattern of his conduct in regard to frequency and length of time at the Crestview had not changed recently.

Hicks testified that he has no regular run but had been assigned to drive to Tiptonville on December 9. He stopped at Crestview on the way, getting there ahead of Presson and Foster, and he left when they did.[4]

Hicks testified that as he left the restaurant slightly ahead of Foster and Presson, Ross shouted to him, "Hey, Hicks, this is it. The man told me to fire you on the spot

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[3]Siegel knows most of the drivers because they were under his supervision at one time.

[4]The drivers' logs, which show time of departure and arrival at various points, are not too helpful in determining exactly when a driver left or arrived at a given point, for the time is entered to the nearest quarter hour.

when I caught you stopped." Hicks said that since he knew that Ross was aware that he and other drivers had been stopping at Crestview for some time, he responded, "You've got to be kidding," but Ross replied, "No, it's the truth," and added, "He told me to fire all three of you." When Presson and Foster came within speaking range, Ross told them essentially what he had just told him. Ross then telephoned Thornton at the plant, and returned to inform the three discharged drivers that he had been instructed to remove the ignition keys from their vehicles and drive them back to Bruceton.

Hicks added to Foster's account the information that during the course of the drive to Bruceton there was some reference to Respondent's failure to warn the drivers and that Ross conceded that he knew that all the drivers stopped at Crestview, some longer than the dischargees, but that Thornton had instructed him not to issue a warning, but to fire the drivers when he caught them.

Hicks' version of the drivers' meeting with Sam Siegel that afternoon is essentially like Foster's. The men protested their discharges, but Siegel told them he was sorry, but he could do nothing about them because Respondent had written evidence that they had been spending as much as an hour or two at Crestview. Hicks denied this charge, but Siegel replied that the drivers were paid for the entire day and were not entitled to take coffee or lunch breaks on Respondent's time.

According to Hicks, he has stopped at Crestview on several occasions in the past, but not "too frequently." His longest stop when he did, he said, was not over 20 minutes.

Presson testified that Hicks was already stopped at Crestview when he arrived and that Foster entered the restaurant within 5 or 10 minutes. His testimony about what Ross told them as they left the restaurant is basically like Hicks', and I credit that much of it. He said, for example, that he could not at first believe Ross' announcement

that all three drivers were discharged because Thornton had ordered him to fire them "on the spot." Ross admitted that he had never warned the drivers about their conduct, and when Presson argued that other drivers engaged in the same practice, Ross replied that he only had orders to fire those he caught stopping that morning.[5]

Presson said, and I credit his uncontradicted testimony, that he had been stopping at Crestview "four or five times" each month for approximately 15 or 20 minutes for the last 5 years, that he knew he should not remain there "for any long period of time," but that he had never been told by anyone to change his habits.

Ross, the drivers' immediate supervisor and dispatcher, was admittedly acting under instructions from Thornton to terminate the drivers he caught at the Crestview on December 9. Thornton testified that he had known for at least two years that drivers were stopping at the Crestview. He said that although there was some discussion about the practice among management officials, no investigation of it was made until May 1971, after he had seen three of Respondent's vehicles parked outside of the restaurant on overtime. Because of what he had personally observed, he said he discussed it with Ross, and it was decided to have Security Manager Hollingsworth conduct an investigation to determine the extent of the practice. Hollingsworth placed the restaurant under surveillance intermittently during June and July 1971, but discontinued it, Thornton said, on advice of counsel, while the Union's election proceeding was pending before the Board.

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[5]I do not credit Presson's statement that the drivers charged Ross with "setting them up" that morning and that he admitted that they were "set up." These words do not appear in Hicks' and Foster's versions, and Ross denied making the remark. I am convinced that Presson believes from the circumstances that Respondent had planned to permit him and the others to take breaks at Crestview that morning while under surveillance and, in that sense, "set them up." But this is his conclusion and not Ross' words.

Thornton said that the investigation began again in November, after the Board had certified the results of the election, because the Respondent had heard that the practice of drivers stopping at the Crestview was still alive. This investigation disclosed that drivers were spending an hour or more at the restaurant, Thornton said, and during President Jesse Siegel's visit to Bruceton in late November to discuss a coming Board election for the employees at Respondent's Fulton plant, Thornton mentioned the practice to him. He said that Jesse Siegel told him to continue his investigation and to have "someone go down there and determine if this is happening, see it on the spot, and fire the people on the spot." Siegel did not tell Thornton to select any particular driver.

Thornton relayed Siegel's instructions to Ross. He said he told him to personally observe the drivers at Crestview and if they "were abusing the stop privilege . . . if they stayed longer than 15 or 20 minutes, that he was to go in and the drivers who happened to be there, he was to terminated them on the spot." He explained that by "abusing the privilege" he meant taking more than a 15 or 20 minute break, but he also said that "10 or 15 minutes at that hour of the morning would have been reasonable" and that the company felt that its prior investigation would show that whomever would be found at the Crestview that day would also have been there "in June, July and August," and so the immediate abuse of break time "plus past conduct amounted to the reason for the discharges."

Ross was instructed to take another company representative with him and not to permit the potential discharges to drive their equipment back to Bruceton. Thornton said he did not instruct Ross when to go to Crestview or who to observe, and he had to "prod him several times" before he carried out his orders.

Jesse Siegel testified that having learned from Thornton in June 1971 that company drivers were "killing time"

at the Crestview, he instructed him to have Hollingsworth investigate and determine how extensive the practice was. He received no written reports from either Hollingsworth or Thornton after the investigation commenced, but they told him that they were investigating and would keep him informed. No action was taken in June, July or August, but Siegel said he knew that Thornton and Hollingsworth were continuing their surveillance and were maintaining records.

During the course of a meeting in Bruceton with company counsel and a local plant manager to discuss the coming Board election for the Fulton employees, Thornton told him that "the truckdrivers were continuing to take inordinate breaks . . . and that this was causing the company delay in getting its material to its plant and, also, was causing considerable overtime costs." This report perturbed him, Siegel said, because he was "tired of hearing these stories," and so he directed Thornton the "next time he catches any drivers taking inordinate breaks he should dismiss them on the spot." He said he did not tell Thornton who to discharge or when to do it.

Ross testified that surveillance of the Crestview continued from June to the middle of August and was resumed in late October or early November. When investigation revealed that the drivers were still taking long breaks at the restaurant, Thornton advised him that he must act to stop the practice. He delayed doing anything, however, until Thornton asked him a number of times when he planned to act and finally ordered him to go to the Crestview with Hollingsworth and discharge any driver he found spending more than 15 minutes in the restaurant.

On December 9, which Ross said was the first day both he and Hollingsworth were free, they left Bruceton sometime before 8 a.m., after he had given Foster, Hicks and Presson their assignments for the day and after he was

sure that they were about ready to leave for their destinations. When he and Hollingsworth arrived at the Crestview, they parked across the road and waited. Shortly thereafter, two of Respondent's trucks stopped and their drivers entered the restaurant. "About" ten minutes later, another driver parked and went in. Ross said that he and his companion then remained where they were for "approximately" 20 minutes, which would have been 30 minutes after the arrival of the first driver, and then drove across the road and waited for the drivers to leave the restaurant. As they did, they were timed. It was now 9:05 a.m., he said, and Hicks and Presson had spent 40 minutes at the Crestview, and Foster 30.

Ross said that Foster, Hicks and Presson were the only truckdrivers headed toward Gleason at that hour in the morning, and he agreed that he was aware that since they were the only ones he had scheduled to drive in that direction, they were the only persons who could possibly be discharged that morning.

Ross' version of what was said when he confronted the drivers as they left the Crestview is not a great deal different from theirs'. He added, however, that as he got out of the car and approached them, Hicks said "you've caught us all." He also denied that he had made any statements to them about "setting them up." He agreed that he told them that he had orders to fire them if he caught them, but he qualified this by adding that they were to be fired if they spent "any time over break time, 15 minutes" at the restaurant. He also agreed that the men complained about the lack of warnings and that he replied that he was acting under orders from his superiors. He recalled that Hollingsworth stated that he had been checking on all drivers and had records of their stops, but he did not remember any one stating that other drivers remained at Crestview longer that the dischargees. Although

I credit Ross' denial of Presson's testimony about having admitted that the drivers had been "set up" for discharges by Respondent and also believe that Hicks or someone made some remark about being "caught," since I find, as indicated earlier, that Hicks' and Foster's versions are more complete and reliable, I find that Ross or Hollingsworth, or both, admitted to the employees that they were not the only or the worst offenders. I also find that Ross did not specifically tell the men that he had been told to fire them if their breaks exceeded 15 minutes, although he very likely could have mentioned "killing too much time'.

Hollingsworth, Respondent's security manager, began his surveillance of the Crestview in May 1971, at Thornton's request, and he continued it until December, with an interruption during the election period, until the drivers were discharged. During that period he recorded the name of each of the 8 or 9 drivers who regularly stopped at Crestview and the amount of time each remained.[6] Most of his observations were made in the morning at coffee break time, and the amount of time each driver remained inside varied from 12 to nearly 45 minutes, he said, and one driver stayed an hour. He conceded that one driver, who was not discharged, spent more time in the Crestview than Foster and possibly more than Hicks and Presson. He also agreed that after the employees had been discharged they asked him if he had checked other drivers and if they had not spent as much time as they had. He said that he responded that he had and that he thought so.

Hollingsworth's testimony about his participation in the December 9 discharges is similar to Thornton's and Ross'. He had made some reports to Thornton about Crestview and the drivers before December and at that time

[6]Hollingsworth's notes were at first offered into evidence, but it did not clearly appear when the witness had made the entries. General Counsel objected to their admission, and the offer was subsequently withdrawn after Hollingsworth testified from memory.

Thornton told him he had been instructed to recheck the drivers and fire them if they spent over 15 minutes in the restaurant. He went to Crestview with Ross and observed the discharges as Ross had testified. He said that two drivers remained at Crestview for 40 minutes and one for 30. He added little else to Ross' version of what was said to and by the drivers after Ross told them he had orders to terminate them if they "spent that much time in there."[7]

Sam Siegel, whose responsibilities once included supervision of the company's interplant transportation system, testified that he told the drivers when they saw him that they had been discharged because "they were spending too much time, or were taking off time while they were supposed to be working." He explained to them that there were two things the company could not tolerate, namely, "stealing or wasting time," and he said that the drivers knew this, or should have known it, for anyone who had worked for the company for any length of time did.

Siegel testified that it was "common knowledge" that the drivers were under surveillance, that he had known of it for approximately 9 months before they were fired, that the problem had been discussed internally and that it was agreed that "sooner or later" something had to be done about it because "too many people" were complaining about it.

The company has a policy of issuing warnings to employees for offenses such as absenteeism, tardiness, bad work and other things, Siegel said, but the company did not warn the discharged truckdrivers because the company cannot "warn anybody who is going to steal, take time off . . . because we don't know ahead of time what they are going to do." He said he did not know when drivers took lunch or break periods.

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[7]This is the witness's phrasing.

Siegel said Thornton made the decision to discharge the drivers, and he did not mention Jessee Siegel's participation in it.

2. Analysis, additional findings and conclusions with respect to the discharges

Initially it should be noted that General Counsel established a strong prima facie case that the discharges were illegally motivated. Hicks and Foster were known to have been active in the Union and Presson had also signed a union card and attended a union meeting with Foster. As found earlier, Respondent demonstrated its hostility to the employees' efforts to organize by Sam and Jesse Siegel's and Ross' statements to Foster and Hicks, going so far as to indicate to both of them that their union activities could cause them to lose their jobs. In Hicks' case, Respondent's President Jesse Siegel even suggested that he quit if he were unhappy with existing conditions.[8] All three drivers appeared to have impeccable employment records for they testified credibly that they had never been warned, reprimanded or disciplined during their many years of service. It also appeared that the employees were discharged for doing something that they and other drivers had been doing for years, five in one case, and of which Respondent and everyone else were aware. Finally, Respondent gave the employees no indication of any kind that it considered their conduct, on which it purportedly based its later action, impermissible, let alone cause for termination, and it admitted when it fired them that it knew what they and others had been doing and that the habits of the three involved were no worse and perhaps better than those of other drivers. In the light of these factors, taken in the context of the more than suspicious nature of the stakeout itself, Respondent had to go forward with a credible

[8]Additional evidence of Respondent's opposition to employee union activity is found in the cases cited in fn. 1, supra.

explanation for the discharges, although, of course, the ultimate burden rested on General Counsel to establish his case by a preponderance of the evidence. Based upon a number of considerations, I find that Respondent's explanation of its actions is not credible.

First, the obvious, Employers do not discharge, certainly not three at a time, accident free, competent, dependable, sober and otherwise reliable senior over-the-road truckdrivers without substantial provocation. The dischargees were of such character; their personnel files were bare of reprimands or other material reflecting adversely on them, the Respondent was unable to credibly point to anything significant which it had or could criticize in their past employment.[9] At the end of Respondent's case, the drivers' records were still unassailable. More obviously, employers, especially those who employ personnel managers and maintain personnel records and who follow a policy of warnings and reprimands for the usual employee derilictions, do not discharge employees with records such as these drivers had because their conduct has deteriorated without first counseling with or warning them of the possible consequences of continuing such actions.

There were no warnings in this case and neither had the employees' work habits changed for the worse, because I credit the main thrust of their testimony, corroborated by the company's own intensive and extended surveillance of their coffee breaks, that they were acting on the day they were fired in conformity with their past practices, which brings us to a third obvious factor, which is that employers, acting rationally, do not discharge employees such as these for doing what they always have done, even if only by suf-

[9] I credit Presson's testimony that Ross spoke with him only once about taking too long to make a trip. He explained why he had, and the matter was dropped. I also view Ross' dredging up of this incident as an attempt to buttress the company's actions in this case with an event totally unconnected with the discharges.

ferance, without first advising them that the rules have been changed or will be strictly enforced. To do otherwise indicates that the real reason for action is concealed, for the action suggests entrapment and a "set up".[10]

A fourth obvious factor weakening Respondent's explanation is that it had observed almost all of its drivers taking what it claims were "inordinate" breaks of up to an hour or more, breaks which Jesse Siegel said were delaying material shipments and requiring overtime payments, before it acted to stop the practice. If the situation were as serious as claimed in early as May or June 1971, an employer who had no compunction in discharging such employees without warning in December under the circumstances described, would have been just as hard-nosed in May or June or even November and would not have timidly postponed action. The delay strongly suggests that there was a reason for it other than the one offered. In addition, there was no election petition pending in May, June and July and the first two weeks of August to inhibit Respondent from disciplining its drivers, and so for this reason alone Jesse Siegel's explanation for delay on that basis is unconvincing.

Still another strong factor working against Respondent's explanation is that the drivers were fired allegedly for violating a company rule or policy which I find did not exist. This asserted policy was never made clear to the drivers or even to company officials, for the latter did not seem to understand it or be able to explain it. Ross, for example, testified that there had "always been a standing rule" that drivers could take a coffee break for "ten or

[10]Respondent never actually offered any explanation for deciding not to warn the drivers. Sam Siegel's suggestion that one can't warn a thief because one never knows when he plans to steal is not only a strained analogy, but Respondent had known for considerable time just which drivers had been stopping at Crestview and was aware that they would probably stop there again if they were dispatched in that direction, as they were on December 9.

fifteen minutes" if they had been driving "three or four hours," and that was what "everybody understood," even though this rule or policy had never been reduced to writing. The drivers learned about it, he said, by their asking him and his telling them that it was permissible to stop "if they had been on the road a long period of time." At another point, he said that Thornton told him to fire anyone who spent over 15 minutes on a break. Later he said he told Hicks when he discharged him that he had been ordered to fire any employee who spent over 15 minutes in the restaurant, but still later he said he told him that the dead line was 20 minutes or "15 or 20". In an affidavit given a Board agent prior to the hearing, Ross stated that all drivers knew that the Company "knew they stopped for coffee for 5 or 10 minutes in the morning and it was understood that they could do this." Ross' testimony, therefore, shows that his understanding of the rule shifts. Sometimes a break of only 5 or 10 minutes is permissible and at other times 15 or 20 minutes is tolerated, but these breaks may be taken only if the employee had been on the "road a long period of time" or, if the affidavit accurately expresses the policy at any time in the morning. Asked what he considered a reasonable time for a break, Ross conceded that it depends on what the particular driver "wanted to do." None of the three drivers discharged, of course, had been on the road more than an hour when they stopped at Crestview on December 9, in the morning.

Vice President Thornton's description of company policy was unclear. He said he "would assume" that drivers stop for breaks and that the company has never objected to drivers taking "reasonable breaks." He was aware for some time before the surveillance started from discussions within the management family that trucks were sitting at the Crestview "too long," but nothing was done about it. After he received his instructions from Jesse Siegel to fire drivers

who were "abusing the privilege," he instructed Ross to discharge anyone caught "exceeding 15 or 20 minutes".[11]

There is nothing in Jesse or Sam Siegel's testimony about an exact time limit on breaks. Jesse said he heard that the men were taking "inordinate" or "long coffee breaks," and ordered their discharges on that basis. Sam Siegel said that the men had been "taking off to much time" but he was unable to state what the company policy was on morning or afternoon breaks for drivers. He indicated at one point that because drivers were paid for all hours from the time they clocked in until they clocked out, they were not really entitled to take coffee breaks at all, and, according to Hicks credited testimony, he told the drivers so when they spoke with him after their discharges, although he also told them that the company "had evidence that (they) had been spending too much time parked on the road."

I find as already indicated, therefore, that there existed no rule precisely limiting the amount of time a driver could spend on a coffee break and that the only limitation was the vague standard of "reasonableness." The men had never been told otherwise and were discharged for doing exactly what they had done in the past with company knowledge. The company's action in terminating them on the basis of a non-existent 15 or 20 minute rule without a clarification of what was expected of them in the future was harsh and arbitrary, and this is additional evidence that the asserted reason for discharge is pretexrual.

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[11]As set out above, Thornton also stated that he thought 10 or 15 minutes would be a "reasonable" break at that time of the morning, but he also testified that those drivers expected to be found at the Crestview on December 9 would have previously engaged in an abuse of break time and that their past conduct, "plus" their conduct on December 9, was the cause of their discharge. This combination, of course, makes Respondent's policy even harder to understand.

I have also indicated that the total set of circumstances surrounding the implementation of the company's claimed policy are so bizarre from any industrial relations point of view as to indicate that no legitimate business or management interest was served by the discharges, and this suggestion is supported not only by what has been found to here, but also by the following. According to Respondent's officers, drivers had been suspected of abusing their privileges for 2 years and known, on the basis of extended profesisonal surveillance, to be spending up to an hour or more at the Crestview. All this, names, dates and time spent, was documented. Thornton had the power to fire any driver on the basis of this conduct and Ross had the power to recommend it, yet neither took any action until Jesse Siegel ordered it, and Ross had to be prodded three or more times to execute President Siegel's orders.

If the driver's habits were interfering with Respondent's plant operations and increasing its costs, as Jesse Siegel suggested in his testimony, it is more than likely that Thornton, vice president in charge of all plant operations would have seen that the problem was remedied without Siegel's personal intervention.[12] At least it would not have been normal for him to have waited from June to December to resolve it. Then when Respondent finally decided to act, Ross dispatched three drivers in the direction of Gleason, full knowing on the basis of past performances that all or some of them would more than likely stop at Crestview. When he and Hollingsworth were satisfied that the drivers were ready to depart, they rushed to Crestview and waited for the drivers to enter the trap, prepared to discharge them all if they spent more than 15 or 20

[12]Jess Siegel is the only witness who mentioned interference with production as one of the effects of the drivers' stops at Crestview, and there is no other support in the record for this statement. I find it to be an exaggeration and an afterthought bearing on his credibility.

minutes, as they always did, in the restaurant. This from its beginning was a long, tedious, costly and inefficient procedure, and I do not believe that it happened that way for the reasons given by Respondent. The better inference is that the discharges under those circumstances were connected with something other than driver efficiency.

Respondent has not fired, disciplined or warned any other drivers because of unduly long coffee breaks since the three drivers in this case were terminated, and surveillance seems to have ceased. What Holland, a driver who took longer breaks than Hicks did and who was not disciplined, is doing now the record does not reveal and what the drivers understand the company's policy to be today is purely conjectural. No new rules have been issued nor have the old ones been clarified. The shock of the wholesale firings may have eliminated the Crestview as a rest stop, but it would seem that whether this place is off limits or whether any breaks for any length of time are allowed is something that an enlightened employer would want to make clear to its employees. The failure to do so is some evidence that the elimination of Hicks, Foster and Presson solved the only real "problem" they were connected with which concerned Respondent, that is union organizing among the drivers.

Finally, Respondent's witnesses appeared to have realized the unreasonableness and harshness of Respondent's ultimate action because they attempted to rationalize it, sometimes without logic or conviction. Jesse Siegel's testimony, for example, that he waited from June to December before he acted because he is a careful person who did not want to act "precipitately," was unrealistic in the light of the subsequent discharges without warning and without regard to the prior records of the individuals involved. It was like saying that one does not act hurriedly so that one may act arbitrarily when one does act. A bulletin

board notice, a drivers' meeting or a word from Ross to the drivers would have accomplished any legitimate management goal. Ross' testimony about why he had not warned the employees before he fired them indicated that he sensed that his role at least was untenable. He admitted that he customarily issued warnings to other employees about rule violations, but said he did not think to warn these drivers because he had not been told to warn or not to warn. Asked what was unique about these three, he answered that their uniqueness rested on the fact that "higher supervision" had told him what to do if he caught them. This reluctant foreman clearly did not have his heart in the job he was sent to do.

An employer "can discharge for good cause, for bad cause, or no cause at all." N.L.R.B. v. T. A. McGahey, Sr., et al., d/b/a Columbus Marble Works, 233 F. 2d 406, 412 (C.A. 5). But the absence of any cause or the presence of a reason for which employees are not ordinarily fired is evidence bearing on the weight of the evidence advanced by the employer to offset an inference of discriminatory motivation from other evidence in the record.[13]

Based upon the factors which I have listed with respect to Respondent's claimed reason for the terminations, I am

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[13]I find it unnecessary to determine whether the employees remained in the restaurant for 15 to 20 minutes, as they stated, or 30 and 40, as Respondent's witnesses testified, for at least two reasons. First, as frequently stressed throughout this decision, they were acting on that day in accord with past practices, and Respondent knew it. Their reactions when confronted by Ross were not those of guilty men hiding their crimes, and Ross sensed their shock and the unreasonableness of his position for he made it clear that he was acting under orders from above. Second, his orders were to fire them after 15 or 20 minutes, depending on which part of Ross' statements are based on fact, and so the three men were not discharged because of 30 or 40 minute breaks, but because their breaks were at least a minute over 20. Since, as pointed out in detail earlier, no employee could have understood the rule to be that strict or precise, Respondent's predetermined response to what it expected to find at Crestview was Draconian and absurd.

convinced that the reason put forth does little to offset the inference that the terminations were illegal. I have also examined Respondent's argument that since no union activity occurred after the election and another election could not be held for a year, an inference of unlawful retaliation is not proper. The election was lost by a vote of 10 to 6, and so there still was a nucleus of union strength to threaten Respondent with another election which might go the other way. The elemination of three union sympathizers would insure against such a possibility.[14]

I have also noted that Presson's union activities were not extensive, but I think it likely that Respondent was aware of them because it knew that a "carload" of employees had gone to another town to attend a union meeting. However, whether or not Respondent knew of Presson's activities or whether it would have discharged him if he alone had stopped at Crestview that day, I am convinced that having decided to discharge Hicks and Foster if it caught them at Crestview on December 9, Respondent had to discharge Presson under the same circumstances or make the illegality of Hicks' and Foster's findings apparent. In such a case, Presson's discharge is equally discriminatory.

I conclude that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Foster, Hicks and Presson.

## IV. The Effect of the Unfair Labor Practices Upon Commerce

It is found that the activities of the Respondent set forth above, in section III, occurring in connection with its operations described in section I, have a close, intimate, and substantial relationship to trade, traffic, and commerce

[14] Another election could be held under the Act in September 1972, and the Board will accept a petition before a year elapses so that it may be processed. Upon compaigning, therefore, could commence again in much less than a year.

among the several States and tend to lead to labor disputes burdening and obstructing commerce and free flow of commerce.

## V. The Remedy

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, it will be recommended that the Board issue the Recommended Order set forth below requiring Respondent to cease and desist from said unfair labor practices and take certain affirmative action designed to effectuate the polices of the Act.

Having found that Respondent violated the Act by discharging James Foster, Willis Hicks and Thomas Presson, I will recommend that Respondent offer them immediate and full reinstatement to their former jobs, or if they are not available, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them, by payment to them of a sum of money equal to what each of them would normally have earned as wages from the date of discharge to the date of the Respondent's offer of reinstatement, less net earnings during such period, with backpay and interest thereon to be computed in the manner prescribed in F. W. Woolworth Company, 90 NLRB 289, and Isis Plumbing & Heating Co., 138 NLRB 716.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

## Conclusions of Law

1. Respondent is an employer within the meaning of the Act, and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization as defined in Section 2(5) of the Act.

3. By discharging James Foster, Willis Hicks and Thomas Presson because they had engaged in union activities, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

4. By engaging in the conduct found to be violations of the Act set forth in section III, B, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[15]

## ORDER

Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees, refusing to reinstate them or otherwise discriminating against them because they engage in union or other protected concerted activities.

(b) Coercively interrogating employees about their union sympathies or activities.

(c) Creating the impression among its employees that it is keeping their union activities under surveillance.

(d) Threatening employees with discharge or other reprisals because they engage in union activities.

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[15]In the event no exceptitons are filed as provided by Section 102.46 of the Rules and Regulations of the Natitonal Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(e) In any other manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer James Foster, Willis Hicks and Thomas Presson immediate and full reinstatement to their former jobs, or if not available, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges and make them whole for any loss of earnings, in the manner set forth in "The Remedy" section of this Decision.

(b) Notify the above-named employees, if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application, in accordance with the Selective Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and make available to the Board or its agents all payroll and other records necessary to compute the backpay and reinstatements rights, as set forth in "The Remedy" section of the Decision.

(d) Post at its Bruceton, Tennessee plant, copies of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 26, shall, after being duly signed by Respondent, be posted immediately upon receipt thereof, in conspicuous places, including all places where notices to employees are customarily posted, and be maintained by it for 60 consecutive days. Reasonable steps shall be taken to insure

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[16]In the vent that the Board's Order is enforced by a Judgment of a United tates Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.[17]

Dated at Washington, D. C.

(s) George J. Bott
Administrative Law Judge

[17]In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

SUPREME COURT, U. S.

No. 73-1359

APR 22 19

MICHAEL RODAK, J

# In the Supreme Court of the United States

OCTOBER TERM, 1973

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HENRY I. SIEGEL CO., INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## OPINIONS BELOW

The court of appeals issued no opinion. The Board's decision and order (Pet. App. 16-50) are reported at 202 NLRB No. 125.

## JURISDICTION

The judgment of the court of appeals was entered on December 10, 1973 (Pet. App. 15). The petition for a writ of certiorari was filed on March 8, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the company violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging three employees because of their union activities.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3.

## STATEMENT

The Board found that petitioner Company violated Section 8(a)(3) and (1) of the Act by discharging employees Willis Hicks, James Foster, and Thomas Presson because of their union activities (Pet. App. 46). The Board also found that the Company violated Section 8(a)(1) of the Act by coercively interrogating employees concerning their union activities and sympathies, by creating the impression of surveillance of employees' union activities, and by threatening employees with loss of employment if they selected union representation (Pet. App. 22, 27). The court below sustained the Board's findings (Pet. App. 15). Petitioner challenges only the finding that the discharges of Hicks, Foster, and Presson were unlawful. The evidence relevant to that finding is as follows:

The Company, a clothing manufacturer with a large distribution center in Bruceton, Tennessee, transports goods between its various manufacturing plants and the distribution center in its own trucks (Pet. App. 19; A. 33-35, 38, 112-113).[1] In late July or early August 1971,[2] a local of the Teamsters Union (the Union) began an organizing campaign among the Company's twelve drivers and four mechanics. This culminated in a Board election on October 21, which the Union lost by a vote of ten to six (Pet. App. 20; A. 14, 16, 61, 80).

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[1]"A." refers to the appendix to the briefs in the court of appeals.

[2]All dates hereafter are in 1971.

Thomas Hicks signed a union authorization card, solicited other employees for the Union, attended three union meetings, including one at his home, and acted as the Union observer at the election (Pet. App. 29; A. 80, 83, 94). James Foster signed a union authorization card and attended two union meetings, and Thomas Presson signed an authorization card and attended one union meeting (Pet. App. 28-29; A. 39, 44). Hicks was the Company's senior driver with ten years of service, seven as a driver (Pet. App. 29; A. 79). Foster and Presson had driven for the Company six and five years, respectively (Pet. App. 29; A. 39, 61). All three employees had good work records (Pet. App. 29; A. 22, 39, 65, 85, 204).

On or about August 17, petitioner's vice president Sam Siegel called Hicks into his office and asked, "What's going on among the truckers?" (Pet. App. 22; A. 15, 80, 115). When Hicks responded by asking if Siegel had heard anything, Siegel said he had heard that the drivers had signed union authorization cards (Pet. App. 22; 80-81). Hicks conceded that cards had been signed, and Siegel asked, "Why did you sign the cards and what do you expect to gain by it?" (Pet. App. 22; A. 81).

Later that day, Hicks was asked to return to Sam Siegel's office to relate to Jesse Siegel, petitioner's president, what he had told Sam Siegel earlier (Pet. App. 23; A. 82, 105). Hicks repeated that he and other drivers had signed union cards (Pet. App. 23; A. 82). Jesse Siegel then asked Hicks why the men did not quit if they were dissatisfied (Pet. App. 23; A. 82). Sam Siegel added that employees could lose their jobs because of the union activities, asked Hicks where he would get another job if he lost this one, and told him, "If you stick your neck out you are liable to get it chopped off" (Pet. App. 23; A. 82).

In early September, Foster was called to Sam Siegel's office and informed that Siegel understood that a carload of employees had gone to a meeting concerning the

Union (Pet. App. 20-21; A. 63). When Foster admitted that this had occurred, Siegel stated, "I guess you know that could mean your job if you people vote the union in" (Pet. App. 21; A. 63). Toward the end of September, Supervisor Jesse Ross asked Foster not to vote for the Union, telling him that the Union "was going to put some people out of jobs" and that he did not want to see Foster "hurt" (Pet. App. 21; A. 64, 161). Ross informed Foster that he "had been told by the higher officials that some was going to lose their jobs" (Pet. App. 21; A. 73).

Petitioner's drivers traveling between its Gleason, Tennessee plant and its plants northwest of Gleason frequently stopped for coffee breaks and lunch at a restaurant in Gleason called the "Crestview Drive Inn" (Pet. App. 28; A. 42, 45, 68, 90, 159). Petitioner's vice president Klein Thornton, in charge of the trucking operation, had been aware of the drivers' longstanding practice for at least two years (Pet. App. 28, 32; A. 125, 134). The drivers had never been reprimanded for their practice of taking coffee breaks at the Crestview (Pet. App. 28, 37-38; A. 41-42, 65, 70, 85, 195). Thornton had petitioner's security manager, Hollingsworth, place the restaurant under surveillance from June to mid-August 1971 (Pet. App. 28, 32; A. 126, 139). Hollingsworth timed the stops of the eight or nine drivers who regularly stopped at the Crestview, noting that they took coffee breaks for periods ranging from twelve minutes to more than one hour (Pet. App. 36; A. 143). Hollingsworth's investigation was discontinued in August because of the impending Board election, but was resumed in November after the election (Pet. App. 32-33; A. 126-127).

On the morning of December 9, Supervisor Ross assigned Hicks, Foster, and Presson to routes that would take them through Gleason (Pet. App. 34-35; A. 54, 83, 177-178). No other drivers were dispatched on such a route (Pet. App. 35; A. 185-186). Ross and Hollingsworth arrived at the Crestview before the three drivers, and parked across the road from the restaurant (Pet. App. 35; A. 144-146). Shortly thereafter, Hicks and Presson stopped their trucks and entered the restaurant, followed ten minutes later by Foster (Pet. App. 29-30; A. 50-51, 65, 83, 146, 166).

When the drivers left the restaurant, after having spent from fifteen to forty minutes there,[3] Ross told them that they were fired—that he "had orders to fire [the men] on the spot when [he] caught [them] stopped" (Pet. App. 29-31; A. 64, 84, 147, 168). Ross added that he knew other drivers also stopped at the Crestview, some for longer periods, but that Hicks, Foster, and Presson had been fired because they were the only drivers "caught stopped" (Pet. App. 29-30, 31, 36; A. 66-67, 150). Upon returning to Bruceton, the three men were told by Sam Siegel that they were not entitled to take lunch or coffee breaks because they were paid "straight through" (Pet. App. 30-31; A. 43, 56, 67, 87). Petitioner did not warn, discipline, or discharge any other drivers for stopping at the Crestview after the discharges of Hicks, Foster, and Presson (Pet. App. 44; A. 186-187).

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[3]The administrative law judge found it unnecessary to resolve the conflicting testimony on this issue (Pet. App. 45, n. 13).

The administrative law judge concluded that the General Counsel had established "a strong prima facie case that the discharges were illegally motivated" (Pet. App. 38).[4] The administrative law judge further found that the Company had not overcome this showing of illegal motivation, for its "explanation of its actions is not credible" (Pet. App. 39).[5] The Board adopted the administrative law judge's findings and held that the discharges of Foster, Hicks, and Presson violated Section 8(a)(3) and (1) of the Act. It ordered the Company to reinstate them with back pay (Pet. App. 16-17; 46-49).

The court of appeals found that the Board's unfair practice findings were supported by substantial evidence, and enforced its order in full (Pet. App. 15).

## ARGUMENT

The sole issue raised by the petition is whether there is substantial evidence to support the Board's finding that the actual motive for the discharges of Hicks,

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[4]Thus, he noted that "Hicks and Foster were known to have been active in the Union and Presson had also signed a union card and attended a union meeting with Foster"; the Company had "demonstrated its hostility to the employees' efforts to organize by Sam and Jesse Siegel's and Ross' statements to Foster and Hicks, going so far as to indicate to both of them that their union activities could cause them to lose their jobs"; all "three drivers * * * testified credibly that they had never been warned, reprimanded or disciplined during their many years of service"; and "the employees were discharged for doing something they and other drivers had been doing for years * * * and of which * * * [the Company] and everyone else were aware" (Pet. App. 38).

[5]He stated, *inter alia*, that "the drivers were fired allegedly for violating a company rule or policy [respecting coffee breaks] which I find did not exist" (Pet. App. 40).

Foster, and Presson was their union activities. That evidentiary issue does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, as we have shown, there is ample support in the record for the Board's finding.

The decision below is not in conflict with *National Labor Relations Board* v. *McGahey*, 233 F. 2d 406 (C.A. 5). The court there found no "substantial basis of believable evidence" pointing toward unlawful motivation in the discharge of two employees. *Id.* at 413. Here, by contrast, the court of appeals upheld the Board's finding that the Company had shown no credible explanation for the discharges to rebut the "strong prima facie case" of illegal motivation.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1974.